Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DR. ANTHONY VIAZIS,

Petitioner,

v.

AMERICAN ASSOCIATION OF ORTHODONTISTS, SOUTHWESTERN SOCIETY OF ORTHODONTISTS, GAC INTERNATIONAL, INC., AND LEO A. DOHN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Summary adjudication may be avoided in a Sherman Act §1 conspiracy case where the evidence, taken as a whole and viewed in the light most favorable to the non-movant, "tends to exclude" the possibility of independent action. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 ~~(emphasis supplied)~~.

1. Did the Fifth Circuit err by employing a compartmentalized standard of review of the evidence, rather than viewing it as a whole, as *Matsushita* requires?

2. Did the Fifth Circuit err by employing a rule-of-reason standard of review of the conduct of a trade association in sanctioning truthful direct advertising to the public, thereby immunizing such conduct, in contravention of *Cal. Dental Ass'n. v. FTC*, 526 U.S. 756 (1999)?

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PARTIES TO THE PROCEEDINGS BELOW

The sole plaintiff-appellant below and sole petitioner in this Court is Dr. Anthony D. Viazis.

Defendants-appellees below and respondents in this Court are the American Association of Orthodontists ("AAO"), Southwestern Society of Orthodontists ("SWSO"), GAC International, Inc. ("GAC") and Leo A. Dohn ("Dohn").

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Petitioner, Dr. Anthony D. Viazis, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on December 11, 2002.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, filed by Smith, J., is reported at 314 F.3d 758, and is reprinted in the Appendix hereto as Ap. A1-A23, *infra.*

The final judgment and memorandum decision of the United States District Court for the Eastern District of Texas (Brown, D.J.) have not been reported. They are reproduced in the Appendix hereto respectively as Ap. B1-B2 and C1-C41, *infra*.

JURISDICTION

The final judgment and memorandum opinion of the District Court were entered on September 24, 2001. The judgment of the court of appeals was entered on December 11, 2002. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. §1, provides: "Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal."

STATEMENT

A. Underlying Facts

In 1991 Viazis, an orthodontist[1], designed and patented a triangular orthodontic brace bracket ("Bracket"). Viazis's research and independent studies suggest that his bracket is dramatically more effective than conventional designs,

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[1] "Orthodontics" is the science and art of straightening teeth. "Braces" is common parlance for a combination of wires and brackets used to straighten teeth. "Orthodontists" are dentists who have completed an additional two-year post-graduate program accredited by the American Dental Association ("ADA").

decreasing the time needed to straighten teeth by up to a year.[2]

In 1992, Viazis entered into a contract with GAC, a worldwide distributor of orthodontic products, to market his Bracket. For several years, the Bracket enjoyed growing sales to orthodontists around the world. Viazis traveled, lectured and published extensively at GAC's behest. In April 1996, Viazis sent a direct mail piece to several thousand households in Plano, Texas, a suburb of Dallas, claiming that his new technology was faster, less expensive and potentially safer. He also announced an upcoming public seminar promoting his brackets. Several of Viazis's competitors and fellow AAO members attended and taped the seminar.

Leo Dohn is the Chairman, chief executive officer and majority shareholder of GAC. At trial, Dohn testified that the Bracket was GAC's "hope for the future," and might be the single most successful bracket ever, gaining up to a 25% share of the $150 million worldwide brackets market. GAC advertised Viazis's Bracket in color, on the cover and in the back of its international catalog, sent to 90% of all domestic orthodontists and 20,000 practitioners worldwide.

B. The Dohn Letter

Shortly after the seminar, Dohn wrote Viazis a "smoking gun" letter that was admitted as the adoptive admission of a co-conspirator under FED. R. EVID. 801(d)(2)(B),[3] (Ap. E1-E3) Dohn told Viazis that several "major accounts" in the Dallas-Ft. Worth area had "threatened" GAC with a national

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[2] The trial court found, in this regard, that:

> "To be sure, the record contains evidence that the Viazis bracket may be a unique and innovative new type of orthodontic device exceeding, in some senses, the quality level of competitive devices." (Ap. C30).

[3] Ap. D2-3.

boycott because of his advertisement. He reminded Viazis that the AAO was "trying to insist that all new techniques and products be submitted for AAO or ADA approval before marketing," and "attempt[ing] to control the entry of all new products and ideas." Dohn expressed fear that the industry's attempt to resist the AAO's control would fail. He scolded Viazis, telling him that "direct advertisement of a medical device intended for use by a professional is the greatest breach of etiquette in orthodontics." As a result, he warned, GAC would soon consider "dropping" Viazis's product. Viazis could expect "severe repercussions" from his fellow AAO members including "legal or professional action."

Dohn angrily informed Viazis that "GAC's significant investment [in the Bracket] is now lost." He complained that Viazis may have "damaged [GAC's] overall reputation and sales, not only in Texas, but in the entire country." "Word of mouth will carry this story around the country," Dohn believed. He closed by starkly ordering Viazis to "destroy all literature" referring to GAC. "Under no circumstances come near our booth in Denver or attend our. . . reception" at an coming national AAO convention. (Ap., E1-3). Just as Dohn predicted, GAC terminated Viazis's marketing contract, the AAO ultimately suspended Viazis's membership for a year, and his bracket sales to orthodontists plummeted.

C. Plaintiff's Economic Testimony

Plaintiff's economist, Frederick Warren-Boulton, Ph.D., a former chief economist of the Antitrust Division of the U.S. Department of Justice, testified that the AAO had an economic motive to suppress the bracket, and that it also had an economic incentive to suppress Viazis's direct comparative advertising. Warren-Boulton opined that GAC was subject to the economic power of the AAO, and *estimated the harm to consumers resulting from suppression of the bracket at ~~$1.3~~ 3.2 Billion.* (Rec.864:16-17.)

D. Judgment as a Matter of Law

At the conclusion of Viazis's case-in-chief, defendants moved for judgment as a matter of law ("JMOL"). The District Court granted the motion. In its memorandum opinion, issued 10 months later, the Court stated that the evidence failed to demonstrate collusion on the part of GAC, even though "[Viazis] presented sufficient evidence of causation against all Defendants." (Ap. C39).

In granting JMOL, the District Court examined the evidence on a piecemeal basis, rather than as a whole. In doing so, it failed to draw factual inferences in the non-movant's favor, failed to view the evidence in the light most favorable to Viazis[4], failed to leave credibility determinations or legitimate inferences to the jury, and ignored the probative testimony of plaintiff's economist.

E. Appeal to the Fifth Circuit

On appeal, the Fifth Circuit noted the absence of an explicit agreement, finding that the Dohn Letter was merely "dealer-initiated contact." It found insufficient evidence of a nationwide boycott, concluding that GAC's conduct was arguably consistent with its independent self-interest, and, like the District Court, found "no connection" between the AAO and GAC. (Ap. 7). The Court found no evidence that the AAO ethics proceedings were a "sham" or that the standards applied "pretextually," rejecting collusion on the part of the AAO, despite lack of any proof that Viazis's ad was untruthful.

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[4] The District Court gave lip service to these requirements of FED.R.CIV. PROC. 50(a)(2), (*see infra*, Ap. C5), but failed to apply them.

REASONS FOR GRANTING THE WRIT

I. Use of a compartmentalized standard of review conflicts with the decisions of this Court and other Circuits.

Certiorari should be granted in this case because the Fifth Circuit's decision, ostensibly applying *Matsushita* and *Monsanto*, erroneously compartmentalizes the evidence, fails to view the evidence in the light most favorable to the non-movant, fails to resolve ambiguities or draw inferences in the non-movant's favor, ignores clear evidence of a tacit agreement, and ignores the economic evidence, both as to plausibility and motivation.

A. *Matsushita* requires that if the evidence, *viewed as a whole*, "tends to exclude" independent action, the case must be submitted to the jury.

Without reason, both courts below decline to apply this Court's explicit test for determining the sufficiency of the evidence of a horizontal antitrust conspiracy. A party opposing summary adjudication in such cases must demonstrate a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray Right Serv. Corp.*, 465 U.S. 752, 768 (1984); *Masushita Electric Industry Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The evidence must "tend[] to exclude the possibility" that actions allegedly in concert were in fact undertaken independently. At least some of the evidence may be ambiguous, and all of it may be circumstantial. *Id.* The substantive law limits the inferences that may be drawn from ambiguous evidence, as well as the drawing of inferences to support a claim that makes "no economic sense." *Matsushita*, 475 U.S. at 588. Once again, however, where the alleged concert is logical, the courts require no more than normally probative evidence. *Id.* at 587, 596-98. If the actions of putative conspirators make more sense as actions taken in

concert than as independent moves in a competitive market, the inference of conspiracy may be drawn. *Id.*

It is axiomatic that in reviewing circumstantial evidence allegedly probative of conspiracy, trial courts must avoid "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). In addition, "[a]cquiescence in an illegal scheme [such as was undertaken here by GAC] is as much a violation of the Sherman Act as the creation and promotion of one." *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948), *quoted in MCM Partners v. Andrews-Bartlett & Assocs.*, 62 F.3d 967, 973 (7th Cir. 1995) (Posner, J.).[5]

Nor need the evidence of an agreement be explicit. This Court has long recognized that a tacit horizontal conspiracy may be unlawful under the Sherman Act. *See, e.g., Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators"). Collusion is unlawful so long as the parties have culpably "deprive[d] the marketplace of the independent centers of decision making that competition assumes and demands." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984). This court has also long recognized that conspiracy can be proved by circumstantial as well as direct evidence. *See, e.g., Eastern States Retail Lumber Dealers' Ass'n*, 234 U.S. 600, 612 (1914) ("conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done"); *Interstate Circuit*, 306 U.S. at 221; *American Tobacco v. United States*, 328 U.S. 781 (1946).

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[5] "[A] Section 1 violation is not negated by the fact that one or more of the co-conspirators acted unwillingly, reluctantly, or only in response to coercion." *MCM Partners, supra*, 62 F.3d at 973.

In sum, neither *Matsushita* nor *Monsanto* permits a court to summarily dispose of a complaint that makes "economic sense" (*Matsushita*, 475 U.S. at 587) and is supported by evidence probative of conspiracy. Yet the courts below, by segregating and parsing away discrete facts one-by-one, evade or fail to apply these standards.

The lower courts also place false emphasis on *Monsanto*. In the 1984 *Monsanto* decision, a plaintiff claimed that his termination as a dealer was the result of a vertical price-fixing conspiracy between a manufacturer and its other dealers, his competitors. Recognizing that manufacturers were likely to have procompetitive reasons for limiting price competition among their dealers, *Monsanto* established a high standard of proof in such cases, so that terminated dealers could sue manufacturers only in cases where the ancient Per Se rule against resale price maintenance applied.[6] The *Monsanto* Court stressed that requiring evidence "tending to exclude" independent action was essential in order for manufacturers to be able to pursue competitive interests without fear of unwarranted antitrust liability to dealers.[7]

As suggested above, direct evidence is unnecessary, although it is arguably present here, in the form of Dohn's "smoking gun" letter. "Only rarely will there be direct evidence of an express agreement in conspiracy cases." *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.,*

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[6] The decision in *Monsanto* was an important step in this Court's ultimately successful attempt to limit the reach of the time-honored, but much-criticized, holding in *Dr. Miles Medical Co. v. John D. Park & Sons Corp.*, 220 U.S. 373 (1911) (establishing per se rule against resale price maintenance). *See also Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988) (limiting per se rule of Dr. Miles to agreements on specific prices, thus leaving manufacturers free to encourage dealers to compete on service and other non-price elements, with potential benefits to interbrand competition).

[7] See also notes 13-14 *infra* and accompanying text.

381 U.S. 676, 720 (1965). As *Monsanto* recognized, circumstantial evidence alone may be dispositive. 465 U.S. at 765-66. Indeed, this Court has repeatedly held that unlawful understandings may be tacit and can arise without verbal communications. *See, e.g., United States v. General Motors Corp.*, 384 U.S. 137, 142-43 (1966) ("It has long been settled that an explicit agreement is not a necessary part of a Sherman Act conspiracy.") Yet the absence of proof of an explicit, unambiguous or sufficiently explicit tacit agreement forms the core logic of the lower courts' misapplication of the law.

B. Piecemeal review and the case at bar – erroneous summary denial of an unlawful conspiracy

In direct contradiction of the "tends to exclude" test of *Matsushita* and its progeny, the courts below compartmentalize the evidence, conduct a piecemeal analysis, fail to view the overall conduct of the defendants in the light most favorable to the non-moving party, and draw multiple adverse inferences in the light least favorable to the non-movant. This approach results here in the denial of the fundamental right to a trial by jury in an important case.

The District Court's compartmentalized approach may be easily seen in its 42 page memorandum opinion, rendered 10 months after granting JMOL. (Ap., C1-C41). The opinion segregates the defendants, isolates the various aspects of their conduct, draws every available adverse inference, examines them in a clearly unfavorable light, and fails to identify many countervailing inferences. For example, with respect to the Dohn Letter, which the District Court discussed in dismissive tones (as described further below), that Court held that "all one can reasonably say Viazis did was to offer a letter…where [sic] Dohn stated that several major Dallas-area accounts had threatened GAC…because they associated Viazis's marketing methods with GAC." (Ap. C8). The most

cursory review of the Dohn Letter immediately establishes that the Court's bland reading of this document is entirely self-serving. (Ap. E1-3). The District Court further finds, specifically, that the Dohn Letter "cannot reasonably be read as much *indirect* evidence of collusion." (Ap. C20 n.5). Surprisingly, the trial court gratuitously avoids or ignores the inferences obviously to be drawn from Dohn's many connected references to orthodontists' "threats," the power of the AAO, his fear of national reprisal, his personal involvement on an AAO science committee, his expectation of sharp reprisals at the upcoming meeting, the AAO's ongoing attempt to "control the entry of all new products and ideas," its effort to cause manufacturers to submit their new products to the AAO or ADA for approval "before marketing," the industry's likely inability to counteract the AAO's control, and GAC's feared "loss of overall reputation and sales not only in Texas, but the entire country," not to mention Dohn's accurate prediction of "professional action" and of the loss of Viazis's marketing contract. None of these facts are even mentioned, much less explained away, by either lower court.

Having arbitrarily dispensed with the single most probative piece of evidence in the Petitioner's case, *i.e,* the Dohn Letter, and of the obvious inferences of collusion to be drawn on the part of GAC, the District Court then turns its attention to the AAO and related entities. As in the case of GAC, the District Court segregates these entities, fails to examine the Dohn Letter's *explicit* reference to future "professional action" by Viazis's competitors as evidence of a connection between the AAO and GAC, ignores the absence of proof of any untruthful advertising, and holds that "the mere sanctioning action of the AAO" does not constitute the requisite concerted action. (Ap. C21). Finding that there is insufficient evidence that the AAO's advertising rules are a "mere sham," the Court ignores its own acknowledgement that the record contains evidence of the bracket's superiority,

(Ap. C30), as well as its own statements that "there is evidence that the AAO took the action it did in furtherance of the objectives that Plaintiff has alleged in his lawsuit." (Rec. 363:21-24.) On this basis, the Court finds no collusion on the part of the AAO.

Turning finally to the issue of unreasonable restraint, the District Court concludes that, despite the suggestion of the Bracket's exclusion from the market, (Ap., C30), *FTC v. Cal. Dental,* 526 U.S. 756 (1999) mandates a full-blown rule-of-reason analysis in such cases, *id.,* a-C27, and holds further that the evidence of coercion does not satisfy the test of Per Se unreasonableness in *Indiana Federation of Dentists,* 476 U.S. 447 (1986). (Ap., C35).

On appeal, the Fifth Circuit holds that there is no "explicit refer[ence]" to an unlawful agreement. (Ap., A11-12). The Dohn Letter is mere evidence of "dealer-initiated contact." *Id.*, (Ap. A 13-14). Evidence of a nationwide boycott is insufficient, and GAC's "dropping" of the Bracket is arguably consistent with [GAC's] independent self-interest. *Id.*, (Ap. A15.) Neither "threats" nor the AAO's arguably pretextual sanction of Viazis is evidence of collusion with GAC, in the absence of proof of a "connection" with GAC, despite the direct references to both in the Dohn Letter. (Ap. A17; emphasis supplied). Evidence that the AAO ethics proceedings were a "sham," or that the standards applied "pretextually," is insufficient, although Viazis's claims were not shown to be untruthful,[8] and the District Court specifically alluded to evidence that his product was

[8] To prove conspiracy, Viazis relied in part on the following *sub rosa* statement of an AAO ethics panel member: "It's not your work, Tony – next time, play by the rules," which the District Court referred to as "evidence of a conspiracy." (Rec.395-98.) The Court of Appeals ignored this inference, although "suspicious," because "it does not *explicitly* reference any agreement." (Ap., A18). Under this tortured analysis, only a plea of guilty would qualify.

"superior." *Id.*, (Ap. A17). Since the case involves restrictions imposed on advertising by a professional association, the Court also concludes that mere demonstration of a "steep decline in sales" to orthodontists is insufficient evidence of coercion. (Ap. A21). Likewise, proof of "drastic reduction" in the number of orthodontist purchasers is insufficient. *Id.*

In order to see how this erroneous standard produced an erroneous result, it is necessary to briefly review the evidence and to observe the obtuseness of the lower courts' efforts, despite their paying verbal homage to *Matsushita* and *Monsanto*.[9] In fact, the undue skepticism exhibited here may be symptomatic of a widespread tendency in the lower courts to read *Matsushita* and *Monsanto* as invitations to exercise creativity in explaining away evidence suggestive of a conspiracy. [10]

It is black-letter law that "conscious parallelism," standing alone, does not establish conspiracy, *Theatre Enteprises, Inc. v. Paramount Film Dist. Corp.*, 346 U.S. 537, 541 (1954), and that something more is needed – what some courts and commentators have called "plus factors." In this case, the circumstantial evidence includes suspiciously parallel conduct, both by the orthodontists themselves, who have almost unanimously refused to purchase the Bracket, and by GAC, which refused to continue marketing it. Another possible conspiracy, not considered by the lower courts, is

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[9] This Court has on previous occasions been willing to examine individual antitrust cases in order to provide needed guidance. *See, e.g., Brooke Group*, 509 U.S. at 230 ("It is not customary for this Court to review the sufficiency of the evidence, but we will do so when the issue is properly before us and the benefits of providing guidance concerning the proper application of a legal standard . . . justify the required expenditure of judicial resources.").

suggested by the parallel policies of orthodontists and of GAC, as well as other manufacturers, with respect to marketing directly to consumers – as many prescription drugs are regularly marketed today, as to many far more complex products, and with added informational benefits to consumers.[11]

Among other essential "plus factors" in any antitrust conspiracy case is a motive to conspire. Although the courts below never observed it, orthodontists have a powerful economic incentive to collectively discourage each other from using the Viazis bracket, which (the court of appeals had to assume) would straighten patients' teeth with less discomfort, fewer visits to the orthodontist, and a lower total cost. GAC, too, had a powerful motive to join the conspiracy – namely fear of what would happen if it didn't, if it took an independent course. Petitioner's most powerful single item of evidence, the Dohn Letter, dramatically reveals that GAC anticipated an orchestrated reaction by orthodontists and their associations if it persisted in doing business with Viazis once "word of mouth" carried the "around the country" the story that he had violated "professional etiquette" in Dallas.

Another important "plus factor" widely employed in antitrust conspiracy cases is parallel conduct that would make no sense for an individual competitor unless his competitors were generally committed to act in the same fashion. The crucial question is whether the action each party took was in its commercial self-interest without regard to what its competitors did. Here, there was evidence from which a jury could easily find that individual orthodontists would have been crazy not to use the superior Viazis bracket if their

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[11] For recent findings of health benefits from such advertising, see articles reproduced at <www.healthaffairs.org/WebExclusive/Pharma_Web_Excl_022603.htm>.

competitors were likely to use it.[12] Similarly, GAC's decision to stop marketing Viazis's bracket made sense only because, as the Dohn Letter shows, GAC faced a potential boycott of all of its orthodontic products if it failed to go along with the orthodontists' conspiracy.[13] Thus, evidence in the record would seem to do more than merely "*tend*[] to exclude the possibility of independent action." Matsushita, 475 U.S. at 586. Once it is accepted that Viazis's bracket was superior to all others (as it must be in the posture of the case), *only* conspiracy – a meeting of the minds on a policy of barring the bracket from orthodontic practice – can explain the choices that the orthodontists and GAC made.

The Court of Appeals hypothesized that GAC might have concluded on its own – threats or no threats – that Viazis's advertising was so obnoxious that it could no longer be associated with him. (Ap. A6). It should be no basis for ruling against Viazis as a matter of law, however, that GAC *may* have decided on its own to stop marketing the Viazis bracket or decided at an earlier date to go along with the

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[12] *Cf. Eastern States Retail Lumber Dealers' Ass'n*, 234 U.S. at 624:

> A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. . . . [But, w]hen the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress . . . .

[13] The Dohn Letter reported multiple threats from orthodontists, and by clear inference, the AAO, that "they will never again purchase from GAC," on a national scale. For an individual customer to carry out such a threat would be against his self-interest (as well as futile) unless a significant number of other customers could also be counted on to bring pressure on GAC.

orthodontists' strong preference for withholding useful information from consumers. Petitioner's evidence concerning GAC's actions was strong enough, particularly when seen in the context of his other proof, to make GAC explain itself to a jury. In any event, those corporate choices, independent though they may have been in some sense, were decisions to join and support the orthodontists' conspiracy – precisely the kind of choice that antitrust law should seek to deter. A decision to market one's products in a way dictated collectively by one's customers is precisely *not* the kind of "marketing strategy" that this Court sought to enable manufacturers to adopt by its ruling in *Monsanto*.

Indeed, in a major error that alone would justify granting this petition, the court of appeals seriously misread this Court's holding in *Monsanto* about the relevance of customer complaints to a supplier in an antitrust case. To be sure, the *Monsanto* Court expressly held that complaints by a supplier's customers about the marketing methods of another customer (their competitor) were not sufficient evidence in themselves of a vertical conspiracy between the supplier and the complaining customers to survive a motion for a directed verdict, 465 U.S. at 764, and both lower courts relied heavily on this aspect of *Monsanto* and similar cases[14] in holding that the complaints received by GAC concerning Viazis did not help to prove a conspiracy against him. But Viazis relied on the multiple threats directed to GAC as only one of several "plus factors," not as the *sole* basis for finding a conspiracy –

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[14] The court cited the following cases, all of which involved dealer complaints about terminations or other actions by a supplier and were therefore distinguishable from Viazis's case on the grounds explained in the text: *Lovett v. Gen. Motors Corp.*, 998 F.2d 575 (8th Cir.1993); *Matrix Essentials, Inc. v. Emporium Drug Mart, Inc.*, 988 F.2d 587 (5th Cir.1993); *Bailey's, Inc. v. Windsor Am., Inc.*, 948 F.2d 1018 (6th Cir.1991); *Culberson, Inc. v. Interstate Elec. Co.*, 821 F.2d 1092 (5th Cir.1987); *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905 (4th Cir.1986).

which is all *Monsanto* would preclude. *Id.* at 764. Moreover, the record in this case would allow a jury to find that GAC was hearing, not just "complaints" by individual customers, but threats of collective boycott if it persisted in dealing with Viazis.

Most importantly, the lower courts failed to appreciate that, as observed above, the *Monsanto* Court had a special reason, not remotely present in this case, for making it difficult for the plaintiff, a terminated dealer, to prove a conspiracy.[15] Unlike vertical conspiracies to practice resale

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[15] As noted *supra*, the *Monsanto* Court was concerned that viewing dealers' complaints to a manufacturer as evidence tending to prove a vertical conspiracy with the manufacturer "could deter or penalize perfectly legitimate conduct" -- namely, the adoption of a "particular marketing strategy" using "non-price restrictions." 465 U.S. 761-64. The Court also anticipated harm to inter-brand competition if a manufacturer could not act on information supplied by one dealer about another dealer's practices in selling the manufacturer's product. While not wanting to overrule the ancient rule against resale price maintenance, the Court clearly wanted manufacturers to be free, in practice as well as theory, to encourage dealers to compete by providing customer services and promotion rather than by price cutting alone: "If an inference of such [a vertical price] agreement may be drawn from highly ambiguous evidence [such as dealer complaints about price cutters], there is a considerable danger that the doctrines enunciated in Sylvania and Colgate will be seriously eroded." *Id.* at 763, citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (adopting rule of reason test for manufacturers' territorial restrictions on dealers, in view of overriding importance of inter-brand competition); *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (declaring importance of preserving manufacturer's right to choose its dealers). It is ironic that the court of appeals cited Colgate's endorsement of a manufacturer's "right . . . freely to exercise his own independent discretion," *id.* at 307 (emphasis added), in answer to Viazis's claim that GAC's decision not to deal with him was either coerced or taken in concert with its customers.

In this case, the Court of Appeals rejected Petitioner's prediction that this Court would have no policy compunctions of the kind seen in *Monsanto* about exposing the orthodontists, the AAO, and GAC to conspiracy charges. Indeed, it missed the point entirely, declaring that,

price maintenance, restraints inhibiting the introduction of efficient new technologies should not be especially difficult for private plaintiffs to prove. In any event, this case is not at all about a manufacturer's freedom to limit competition among its dealers in order to compete more effectively against other brands or about letting manufacturers act freely on information received from their dealer networks.

Still another key "plus factor" to be looked for in finding an antitrust conspiracy is the existence of good opportunities for the alleged conspirators to communicate among themselves so as to make sure they are all on the same page and to coordinate their anticompetitive actions. Here, Petitioner's evidence (e.g., the Dohn Letter) showed that orthodontists have a highly sensitive network for sharing competitively significant information, including influential professional organizations that hold regular meetings and otherwise facilitate the exchange of assurances necessary to make a nationwide conspiracy work. Most crucially, the orthodontists have the AAO, which launched an official investigation of Viazis and eventually sent out the word to the orthodontics profession that he should be regarded as an unethical orthodontist who had misrepresented his product. On this record, a jury could easily disbelieve the AAO's judgment on Viazis's advertising and self-promotion. It is

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like the manufacturers hypothesized in *Monsanto*, GAC was simply pursuing a "marketing strategy," one that eschewed direct-to-consumer advertising. (Ap. A5 n.6). On the basis of Petitioner's evidence, however, a jury could find that that "strategy" was not adopted voluntarily by GAC in its independent self-interest, but was adopted instead either to curry favor with, or to avoid repercussions from, the orthodontists' cartel; either way, the marketing strategy adopted by GAC was in its economic self-interest only because, as the Dohn Letter shows, its customers were capable of effective concerted action if displeased. Because GAC did not choose to defend its actions on the ground that it was coerced to join the orthodontists' conspiracy, *see* 6 Areeda & Hovenkamp, ANTITRUST LAW 1408f3 (2d ed. 2003), it should be treated as a voluntary participant in their boycott of the Viazis bracket.

highly probative of conspiracy, for example, that only orthodontists, not ordinary dentists, refrained from using Viazis's bracket on the basis of the AAO's opinion.[16] It is also striking that the AAO's sanctioning of Viazis for the way he advertised his orthodontic practice in a single, local market for professional *services* effectively discredited a *product*, the Viazis bracket, with orthodontists nationwide. Once the AAO acted against Viazis, orthodontists everywhere could safely assume that their principal competitors would not be using his bracket – so that they ran no risk in boycotting it, too.

A particular instance of the jaundiced view taken of the evidence by the court of appeals was its insistence that Viazis could succeed only if he could prove that the AAO itself (or persons with apparent legal authority to act on its behalf) had threatened GAC. (Ap., A15, *infra.*) But GAC had no such concern as to whether the AAO as an organization was officially behind the threats. Indeed, the Dohn Letter expressed a more general fear about responses by a "hysterical," "overly conservative" profession, and anticipated not only a loss of business from local orthodontists but also "some very sharp comments both from the AAO *members* and fellow suppliers." *Id.* (Emphasis supplied.) In addition to GAC's expectation of "severe repercussions" from "neighboring professionals," Dohn warned that Viazis's conduct had "greatly delayed any acceptance of your technique and may have *entirely destroyed its future.*" *Id.* (Emphasis supplied.) Instead of local reprisal, "GAC/Tomy [has] made a significant investment which is *now lost.*" *Id.* (Emphasis supplied.) Moreover, Viazis's single, localized ad campaign "may have even seriously damaged our overall reputation and sales, not only in Texas, but the *entire country.*" *Id.* (Emphasis supplied.) Clearly, Dohn's statements

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[16] The lower courts never focused on this fact despite its clear tendency to establish that the orthodontists were making collective, not individual, choices.

manifest his belief that the AAO had joined in the conspiracy – indeed, when it was admitted into evidence on this very basis, pursuant to FED. R. EVID. 801(d)(2)(B), the District Court stated that "[a] careful reading of the [Dohn] letter demonstrates that Dohn and GAC believed that threats had been made. (Ap., D3). (The Order admitting the Dohn Letter is reproduced in the Appendix, *infra.* at Ap. D1-4.) In admitting the letter, the District Court concluded that the threats were made by "GAC's accounts (orthodontists), [and] that GAC's accounts linked GAC with Viazis." *Id.* The District Court studiously ignored Dohn's repeated references to the AAO, as contained in the letter. In addition, when Viazis offered evidence that Dohn warned Viazis away from GAC's booth so as not to incur the wrath of AAO officials, the Court again compartmentalized this fact and ignored any negative inference from it, finding that "[t]here is simply nothing sinister about AAO officials and orthodontists having been near an orthodontic manufacturer's booth at an orthodontics convention." (Ap., C14). Exactly when the AAO became an active participant in the conspiracy, liable for the damages it caused, should not be an issue, because it clearly joined it at some point, officially administering the profession's coup de grace in 1997 – an outcome, i.e., "professional action," that Dohn predicted, (Ap., E2) – another connecting link between the AAO and GAC that the District Court ignored.

Another "plus factor" present here is the suggestion that that market is conducive to collusion. Thus, despite the technological superiority of the Viazis bracket and its increasing attractiveness to the subset of ordinary dentists who engage in straightening teeth, hardly any orthodontists were using it at the time of trial. It is hard to imagine any clearer proof that the defendants succeeded in collectively compromising the competitive process of decentralized decision making in the market for orthodontic services and brackets. The lower courts in this case, perhaps sensing and

riding a wave of hostility toward private antitrust conspiracy claims in the federal courts, simply overlooked the serious harm to consumer welfare caused when orthodontists, with the help of co-conspirators such as GAC and the AAO, deny their patients access to a better, cheaper technology.[17]

Petitioner submits that the errors of the lower courts in evaluating the evidence of conspiracy in this case are the direct consequence of a systematic misunderstanding in many federal courts (though not, at the moment, in the Seventh Circuit) of the teachings of *Matsushita* and *Monsanto*. This case presents this Court with a much-needed opportunity to impress upon the judiciary the importance – in a world where corporate wrongdoing happens (sometimes on a prodigious scale) – of taking plausible allegations of antitrust conspiracies very seriously, even in private damage suits. If such wrongdoing is to be effectively deterred, courts must appraise the evidence offered to prove such conspiracies in an evenhanded and realistic way, assessing its probative value with due appreciation of conspirators' ability to project innocence and independence while hiding most of their true motives and interactions.

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[17] In previous cases, this Court has been impressed by the adverse effects on consumer welfare that occur when firms voluntarily offer poorer quality goods and services. *E.g., Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-11 (1985) (defendant's willingness to offer inferior product and to "sacrifice . . . consumer good will" deemed evidence of improper purpose); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 479 n.28 (1992) (customer unhappiness with defendant's service viewed as supporting possible finding of predatory purpose).

C. The Circuits are split as to whether summary review of the evidence of an antitrust conspiracy should be done on a compartmentalized basis

Six circuits hold that the non-movant's evidence should be analyzed as a whole for the purposes of summary adjudication and not be tightly compartmentalized to see if it supports an inference of concerted action. *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, (1st Cir. 1979) (*non-movant's evidence evaluated as a whole to see if together it supports an inference of concerted action) (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962); *H.L. Hayden Co. of New York, Inc. v. Siemens Medical Systems, Inc.*, 879 F.2d 1005, 1012 (2nd Cir. 1989) (non-movant's evidence evaluated as a whole to see if together it supports an inference of concerted action); *AD/SAT, Div. of Skylight, Inc. v. Associated Press,* 181 F.3d 216, 225-26 (2nd Cir. 1999) (same); *In re Baby Food Antitrust Litigation,* 166 F.3d 112, 124 (3rd Cir. 1999) (same); *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 662-63 (7th Cir. 2002) (same); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 327 (8th Cir. 1986) (same); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,* 203 F.3d 1028, 1035-36 (8th Cir. 2000) (same); *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1157 (9th Cir. 1988) (same); *In re Citric Acid Litigation*, 191 F.3d 1090, 1096 (9th Cir. 1999) (same).

Five circuits, including the Fifth Circuit, as demonstrated here, have impermissibly fragmented the plaintiff's circumstantial evidence in determining whether it supports an inference of concerted action to overcome summary disposition. *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 102 (4th Cir. 1987) (each individual piece of evidence evaluated on its own for consistency with inferences of permissible conduct versus concerted action); *Virginia*

Vermiculite, Ltd. v. Historic Green Springs, Inc., 307 F.3d 277, 281-83 (4th Cir. 2002) (same); *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 739-40 (6th Cir. 1999) (same); *Wallace v. Bank of Bartlett*, 55 F.3d 1166,1168-70 (6th Cir. 1995) (same); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1029-30 (10th Cir. 2002) (same); *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1519-20 (11th Cir. 1988) (same).

D. The Compartmentalized review standard conflicts with the Seventh Circuit's recent decision in *HFCS and* encourages inappropriate and unwarranted skepticism toward antitrust conspiracies

Recently, the court of appeals for the Seventh Circuit reversed a grant of summary judgment in favor of the defendants, holding the plaintiffs' circumstantial evidence sufficient to permit a jury to find an actual agreement on prices. Although acknowledging that "no single piece of evidence . . . is sufficient in itself to prove a price-fixing conspiracy," Judge Posner stated, "[T]hat is not the question. The question is simply whether this evidence, considered as a whole and in combination with the economic evidence, is sufficient to defeat summary judgment." 295 F.3d at 661. Noting some confusion in the case law of other circuits as to the "largely if not entirely superfluous" distinction between direct and circumstantial evidence, he asserted that even ambiguous statements "are not to be disregarded because of their ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial." *Id.* at 662.

In *HFCS*, the Seventh Circuit employed a standard of proof under which the plaintiffs' evidence is viewed in its entirety, rather than item-by-item, without overt skepticism, and from a perspective informed by basic economics. In

abandoning the latter approach, the lower courts' analysis reveals the same erroneous approach to the weighing of conspiracy evidence that Judge Posner detected in the law of other circuits. In order to prevent unwarranted emasculation of the antitrust laws, this approach should be rejected.[18]

II. The Fifth Circuit's decision erroneously requires full-blown rule-of-reason analysis of any trade association's use of its ethics rules to restrain truthful advertising, an unwarranted extrapolation of *FTC v. California Dental Ass'n.*

In *FTC v. California Dental Ass'n*, 526 U.S. 756 (1999) (hereinafter "*CDA*"), a 5-4 majority of this Court discussed the nature and quantum of evidence needed to invalidate a professional association's restrictions on professional

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[18] As noted earlier, Judge Posner's method of evaluating the evidence of antitrust conspiracy in *HFCS* provoked three petitions to this Court decrying the conflict in the circuits. That the approach employed by Judge Posner in *HFCS* is well-established – and has been employed to good effect – in the Seventh Circuit is made clear by several earlier decisions. *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 788 (7th Cir. 1999) (in a case alleging a plausible theory of conspiracy, "the interpretation of ambiguous documentary evidence of collusion is for the jury"); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 614 (7th Cir.1997). In *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775 (7th Cir. 1999), the court found sufficient circumstantial evidence to reverse a grant of summary judgment for several paving companies that had been charged by another ("maverick") paving company with collectively getting asphalt suppliers to refuse to deal with it in order to prevent it from competing with their cartel. The court found evidence that would justify a jury in finding that "the reason for the [suppliers'] refusal to deal with [the plaintiff] was that they were in cahoots with the cartel to discourage competition in the [pavers'] market." Viazis's charge that his orthodontist competitors induced GAC to terminate its relationship with him to prevent Viazis's bracket from becoming a factor in competition in the market for orthodontic services has much in common with the charge in *JTC* and deserved the same kind of insightful assessment that the Seventh Circuit made

advertising. Although ruling that the court of appeals had given too little scrutiny to the FTC's evidence of anticompetitive effects, the majority gave no indication that it thought it was changing the law in any significant way. Indeed, the *CDA* case turned heavily on its particular facts, which the majority found so unpersuasive as to require remand to the court of appeals for another, less "quick" look.[19] The key principle established in *CDA* is that, while the antitrust Rule of Reason may sometimes be satisfied by a truncated analysis,[20] "what is required is an enquiry meet for the case." *Id.* at 781.

After the decision in *CDA*, it has been difficult for litigants and lower courts to know, in cases involving alleged restraints by professional organizations, just how extensive and convincing a plaintiff's proof of anticompetitive effects must be to satisfy a reviewing court that trade was unlawfully restrained. While some plaintiffs and trial courts may opt for more extensive discovery, fact-finding, and analysis than are necessary in fact, other courts, like the court of appeals in this case, may find it easy, after *CDA*, to reject plaintiffs' claims on the ground that their showings are inadequate. By reviewing the decision in this case, this Court could provide new and needed assistance to the lower courts on the standard

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[19] On remand, the district court easily dismissed the FTC's case, *California Dental Ass'n v. FTC*, 224 F.3d 942 (9th Cir. 2000), no longer professing any interest in the fact, which it had previously found decisive, that "the record provides no evidence that the [CDA's advertising] rule has in fact led to increased disclosure and transparency of dental pricing." *California Dental Ass'n v. FTC*, 128 F.3d 720, 728 (9th Cir. 1997). The Court of Appeals in this case was prompted by this example, to follow suit.

[20] The majority's favorable citation of *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679 (1978), and *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986), indicated the Court's continuing appreciation of the benefits of truncated analysis, even in cases involving professional restraints.

of proof required in cases involving restraints on competition imposed by professional associations.[21] Presumably the *CDA* majority did not mean to make it nearly impossible to bring successful lawsuits against professional organizations engaged in trade-restraining self-regulatory activities.

In this case, the court of appeals hardly reviewed at all the record evidence on the AAO's sanctioning of Viazis for advertising his bracket as a way of promoting his orthodontic practice. Pausing only to explain away one particularly suspicious comment by an AAO official,[22] the court simply ruled that "Viazis was . . . unable to demonstrate that the ethics proceedings against him were a sham or that the standards applied were pretextual." It is unclear, however, both whether this is the correct legal test and why these matters and the significance of the official's statement were not questions for the jury. After all, the lower courts neither disputed that the bracket represented superior technology nor

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[21] Professional codes of ethics constitute naked restraints on the competitive freedom of individual practitioners. While literally anticompetitive, such codes have not been routinely declared unlawful because they may serve to promote competition, in the sense that they put it on a sounder basis and accordingly benefit consumers. Indeed, the CDA opinion is the most explicit one to date embracing the notion that professional self-regulation may directly restrain competition yet still be open to justification by demonstrating the existence of an identifiable market failure that the restraint in question may help to overcome. See also *Prof'l. Engineers,* 435 U.S. at 692 (language implying that a narrowly drawn, yet naked restriction on competitive bidding, applying only to "complicated . . . projects" and "inexperienced . . . customers," might be defensible). The Court has not been clear, however, on whether the restraint, to be valid, must be shown likely to yield actual results closer to those of an efficient market or whether, contrary to what had appeared to be the rule before *CDA*, *e.g.*, *Indiana Fed'n of Dentists*; *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); Professional Engineers, professionals citing the presence of market imperfections are free to regulate their competitive behavior without meaningful accountability under the antitrust laws.

[22] "It's not your work, Tony. Next time, play by the rules." (Rec. 395-98.)

effectively excluded the possibility, supported by the evidence, that what triggered the sanctions was the threat that the bracket posed to orthodontists' incomes. Although the court of appeals placed great weight on a case involving an industrial standards-setting program, *Consolidated Metal Prods., Inc. v. American Petroleum Inst.*, 846 F. 2d 284 (5th Cir. 1988), the orthodontists maintained no standards that the bracket violated. Instead, there was ample evidence from which a jury might have found the whole enforcement effort to be *ad hoc* (the bracket) and *ad hominem* (Viazis, the maverick competitor).

The court of appeals also could find no sufficient evidence of anticompetitive effects from the AAO actions against Viazis, despite acknowledging that orthodontists are denying their patients his (superior) orthodontic bracket. The court found "no evidence that the AAO has influence over its members' purchasing decisions" and no evidence "connecting [the orthodontists' nonuse of the bracket] to anything other than voluntary decisions by independent orthodontists." Yet individual orthodontists were rather obviously acting against self-interest, and thus inferrably in concert, in refusing to use the bracket despite its technological superiority and lower cost. The court of appeals also thought that Viazis's ability to market the bracket himself or to solicit GAC's competitors to do so proved that competition was unimpaired, despite the obvious likelihood and apparent fact that no one would touch the bracket once the AAO had issued its adverse findings. And, finally, the court again equated the AAO's action to a denial of product certification despite the *ad hoc* character of the proceeding and the product's superiority. Petitioner's evidence would justify a jury finding that the AAO proceeding was a "facilitating practice," enabling the orthodontics profession to orchestrate an effective boycott of Viazis's "better mousetrap."

The court of appeals appears to have read *CDA* as an invitation to give only cursory attention to any legal challenge to a professional association's actions with respect to professional advertising that are ostensibly taken to protect consumers against confusion. Yet important consumer interests may be served by professional advertising,[23] and professional organizations may have ulterior purposes in suppressing it.[24] Review by this Court of the lower courts' actions in this case could serve to correct misimpressions that some lower courts may have gotten from the Court's opinion in *CDA*.

III. A compartmentalized review standard will result in increased conflicts in the lower courts.

As demonstrated above, the lower courts have divided over the proper standard of review concerning circumstantial evidence that "tends to exclude" independent action in the analysis of antitrust conspiracies for the purpose of granting summary adjudication. The decision under discussion, which employs this improper compartmentalization approach, can only exacerbate the significant conflicts which already exist between the circuits as to treatment of these cases.

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[23] See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (overturning statutory prohibition against advertising prices of prescription drugs and recognizing "consumer's interest in the free flow of commercial information").

[24] *See, e.g., American Med. Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980) (upholding FTC action condemning overbroad private restrictions on advertising by physicians).

IV. A compartmentalized review standard threatens the enforcement of the antitrust laws and the protections afforded a free market economy.

The purpose of the Sherman Act, as described by the Supreme Court in *Northern Pacific Railway v. United States,* 356 U.S. 1 (1958), is "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Id.* at 4. The ruling at bar challenges this economic policy by making it unduly difficult for private litigants to avoid summary adjudication in antitrust conspiracy cases.

V. This is a case of national importance.

This case involves the unlawful boycott and exclusion of a new, innovative medical device, one potentially fostering a dramatic reduction in orthodontic treatment times (up to a year), resulting in massive harm to consumers (in excess of $3.2 billion), caused by a classic group boycott. This is clearly a matter of national import, not only for the sake of antitrust jurisprudence, but for the benefit of health care consumers and competition as well.

CONCLUSION

For these various reasons, this petition for certiorari should be granted.

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